IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL TORRES, Appellant.	No. 33141-1-II UNPUBLISHED OPINION

HOUGHTON, P.J. -- Michael Torres appeals his convictions of two counts of first degree child rape and two counts of first degree child molestation, arguing ineffective assistance of counsel and trial court sentencing error. Pro se, he raises multiple additional arguments.[1]

We affirm the convictions but vacate the sentence and remand for resentencing.

FACTS

Torres was A.L.'s stepfather. In 1994, he married A.L.'s mother, Miriam, and they had a son, T.T. Torres separated from Miriam in November 1999 when A.L. (born September 9, 1992) was seven years old. Afterward, Torres occasionally took A.L. to his apartment during weekend visitations with T.T. When A.L. was in fifth grade, she disclosed that Torres sexually abused her at his apartment on two separate occasions. The sexual abuse occurred sometime while A.L. was

[1] Statement of Additional Grounds, RAP 10.10.

in first, second, or third grade.

According to A.L., during one weekend visitation during those years, Torres challenged her to a staring contest. Whoever lost would have to be the other's "maid" and do whatever the winner wanted. II Report of Proceedings (RP) at 171. A.L. lost. Torres undressed and entered the shower. After showering, he lay down on the bed, naked, and told her to rub lotion on his body.

As A.L. did so, Torres got an erection. He told A.L. that "guys have milk too" and that when his penis gets big like that it needed to be rubbed so that the milk will come out. II RP at 169. He had A.L. rub his penis up and down with both her hands. Then he told her it would be faster if she did it with her mouth. She complied. After a while, "white stuff" came out. II RP at 169. He asked her if she wanted to taste it, but she declined.

A.L. said that the second incident occurred as she and Torres watched a movie, *American Pie II*. II RP at 175. He told her that his penis was getting bigger again and that he "needed the milk to come out." II RP at 178. Then he asked her to "milk" it. II RP at 179. Like the first time, he had A.L. touch and perform oral sex on him until he ejaculated. Then he wiped himself with a towel, put his finger in his semen, and offered it to her to taste. She tasted it but it was bitter, not sweet like he had said, and she spit it out.

A.L. did not immediately tell anyone about the incidents. But from late 2001 or early 2002, she resisted going to Torres's apartment. She did not realize that he had done "something wrong" until she was in fourth grade. II RP at 182. That year, she described what happened to a classmate, who responded by telling her it was "a nasty thing to do." II RP at 183. Other classmates heard about it and began teasing her and calling her names.

On March 29, 2004, A.L. tearfully disclosed the sexual abuse to her best friend, C.B., as they rode home on the school bus. As soon as C.B. got home, she told her mother, Christina, who then called A.L. and asked her if it was true. When A.L. said that it was, Christina brought A.L. to her house. Then Christina called Hector Rolon-Hernandez, who lives with A.L. and her mother. Hector went to Christina's house. The two questioned A.L. about the incidents while Christina took extensive notes.

Hector drove to Miriam's workplace to tell her about A.L.'s disclosures. The two returned home and called the Pierce County Sheriff's Department, which began an investigation.

On April 20, 2004, the State charged Torres with two counts of first degree child rape, RCW 9A.44.073,[2] and two counts of first degree child molestation, RCW 9A.44.083.[3] The information alleged that the criminal conduct underlying each of the charges occurred "during the period between the 1st day of November, 1999 and the 1st day of December, 2000." Clerk's Papers (CP) at 1-2.

On January 11, 2005, the first day of trial, the State amended the information, extending the charging period on each of the counts to June 30, 2002. The State noted that A.L. said the alleged incidents occurred sometime after Torres moved out of her home, while she was in first, second, or third grade. Torres moved out in November 1999, and A.L. completed third grade in

[2] "A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim." RCW 9A.44.073(1).

[3] "A person is guilty of child molestation in the first degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.083(1).

June 2002.

Torres's defense counsel objected to the amended information. He claimed that the amended information prejudiced Torres because of a plan to impeach A.L.'s testimony with evidence that *American Pie II* was not released until January 2002. Defense counsel argued that the State should have amended the information months earlier, rather than waiting until the day of trial. Defense counsel stated:

> My preparation for opening, for jury voir dire, for every aspect of this trial has been about the credibility of someone who is going to be asked to provide specific details. Yet, one of the details couldn't possibly have occurred in the time frame that it is alleged, so we believe that the Defendant is absolutely prejudiced at this point in this late moment to have the prosecutor amend the complaint prior to trial.

I RP (Motions) at 7.

Defense counsel asked the trial court to wait until after the State presented its evidence before permitting the amended information. Defense counsel reasoned that this would permit Torres to cast doubt on A.L.'s credibility during trial, lessening the prejudicial effect of the amended information.

The trial court granted the State's motion to amend. Defense counsel did not request a continuance. The parties stipulated that *American Pie II* was released to the public in January 2002.

Torres served as a City of Tacoma police officer at the time of trial. The case received substantial pretrial publicity, in conjunction with ongoing press coverage of the tragic murder/suicide involving former Tacoma Police Chief David Brame, which had occurred about a year before the State filed charges against Torres. Torres believed that the publicity likely

prejudiced the public toward police officers accused of crimes involving domestic violence. Thus, he moved to exclude any reference to his employment as a Tacoma police officer both during voir dire and at trial.

The trial court ruled that during voir dire the attorneys could question jurors about their attitudes toward "law enforcement officers" but without mentioning the Tacoma Police Department. Before approving a questionnaire for use during voir dire, the trial court asked the State to remove a reference to the Tacoma Police Department. The trial court deferred ruling on the admissibility of testimony on Torres's status as a Tacoma police officer, stating that it would make a case by case determination as the issue arose during trial.

Before trial began, the trial court told the jury: "You must not discuss this case with each other, or with anyone else. You should not allow anyone to discuss it in your presence. And you are admonished not to read anything in the newspaper, listen to anything on the radio, the television, or search out the internet with regard to the law or this case." II RP at 35.

During breaks in the trial proceedings, the trial court repeatedly admonished the jury not to discuss the case with anyone and to avoid any media reports. And again, before the jurors began their deliberations, the trial court told them: "You are not to read anything in the newspaper, listen to anything on the radio, television. You are not to research the law or the internet regarding this case." V RP at 595.

Detective Michael Portmann of the Pierce County Sheriff's Department investigated the case. When asked to explain how he became involved in the investigation, he testified: "The incident occurred in the City of Tacoma and involved a member of their city police force, and it was referred to my supervisor, Roger Gouch, who is a lieutenant in charge of the major crime

section who gave it to me to handle." IV RP at 467. Torres did not object to the testimony.

In instructing the jury at the close of trial, the court included "to-convict" instructions on each of the counts stating that the criminal conduct occurred "during the period between the 1st day of November, 1999, and the 30th day of June, 2002." CP at 53-54, 57-58. The trial court's instructions did not ask the jury to decide when during this charging period any of the criminal conduct occurred. The jury returned a guilty verdict on all four counts.

In sentencing on such convictions, under RCW 9.94A.712, the court must impose an indeterminate sentence for convictions of first degree rape and first degree child molestation, consisting of a minimum term within the standard sentencing range and a maximum term of the statutory maximum for the offense. RCW 9.94A.712(1)(a)(i), (3). In addition, the court must sentence the offender to community custody for the maximum statutory sentence. RCW 9.94A.712(5). RCW 9.94A.712 applies to crimes committed on or after September 1, 2001. RCW 9.94A.712(1). For crimes committed before that date, a trial court must impose a determinate sentence within the standard sentencing range, absent cause for an exceptional sentence. RCW 9.94A.589.

At the sentencing hearing, the State argued that the trial court should impose an indeterminate sentence on the two counts relating to the second sexual abuse incident. The State reasoned that the jury must have found that the second incident occurred after September 1, 2001, because A.L. testified that she watched *American Pie II* while the abuse occurred, and the parties stipulated to the movie's January 2002 release date.

Torres argued that because the jury verdict indicated only that the criminal conduct occurred sometime between November 1, 1999, and June 30, 2002, both *Blakely v. Washington*,

542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and the rule of lenity required the court to impose a determinate sentence under RCW 9.94A.589.

The trial court agreed with the State, noting that it determines the applicable statute for sentencing purposes. The trial court concluded that the evidence at trial showed that the second sexual abuse incident occurred after January 2002. It then imposed a determinate sentence on the two counts relating to the first sexual abuse incident and an indeterminate sentence on the two counts relating to the second sexual abuse incident. But according to the judgment and sentence, the "date of crime" on all four counts is "11/01/99 - 12/01/00."[4] CP at 67.

The trial court sentenced Torres at the top of the standard range on all counts. On counts I and II, the trial court sentenced him to 160 months and 89 months, respectively, under RCW 9.94A.589. On counts III and IV, it sentenced him to 160 months to life, and 89 months to life, respectively, under RCW 9.94A.712. It ordered all the sentences to run concurrently. The trial court also sentenced Torres to community custody for life.

Torres appeals.

ANALYSIS

Ineffective Assistance of Counsel

Torres first contends that he received ineffective assistance of counsel when his attorney failed to move for a continuance after the State amended the information on the first day of trial.

The state and federal constitutions guarantee a defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 684, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To prevail in an

[4] On remand, the trial court should review this part of the judgment and sentence as well.

ineffective assistance claim, a defendant must show both deficient performance and resulting prejudice. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). To establish deficient performance, a defendant must show that the attorney's performance fell below an objective standard of reasonableness. *McNeal*, 145 Wn.2d at 362.

To establish prejudice, a defendant must demonstrate that, but for the deficient representation, the trial outcome would have differed. *McNeal*, 145 Wn.2d at 362. We presume that the defendant received adequate representation. *Strickland*, 466 U.S. at 689; *McFarland*, 127 Wn.2d at 335. If defense counsel's performance can be characterized as a legitimate trial strategy or tactic, an ineffective assistance claim fails. *McNeal*, 145 Wn.2d at 362.

Torres attempts to establish deficient performance through his counsel's vigorous opposition to the State's motion to amend the information. But in doing so, Torres showcases his attorney's skillful and well-reasoned advocacy. His counsel argued that Torres would be prejudiced by the amended information because he based his "preparation for opening, for jury voir dire, for every aspect of this trial" on challenging A.L.'s credibility. I RP (Motions) at 7. As part of that strategy, he intended to present evidence that *American Pie II* was not available for home viewing during the period charged, so that the second incident could not have occurred as A.L. described. By extending the charging period, the State undercut Torres's defense strategy.

Torres asserts that, by his own words, his counsel was unprepared to go forward and should have moved for a continuance in order to prepare a new defense. But the defense strategy of impeaching A.L.'s credibility remained viable even though the amended information undercut its force. The amended information eliminated only one means of undermining her credibility. His counsel still had several other ways to cast doubt on her testimony and he did so. Torres does

not show how additional preparation could have improved his counsel's performance.

Significantly, Torres does not suggest an alternate defense strategy. The record shows that his counsel aggressively cross-examined the State's witnesses and made effective opening remarks and closing argument. During cross-examination, defense counsel elicited testimony highlighting A.L.'s inability to remember many details, showing alternate ways that she could have acquired sexual knowledge, and suggesting that her disclosures may have been fabricated. The amended information did not affect Torres's counsel's ability to cast doubt on A.L.'s credibility by these other means.

Because Torres fails to establish his counsel's deficient performance, his ineffective assistance claim fails.

Sentencing

Torres next contends that the trial court erred when it sentenced him to an indeterminate sentence on counts III and IV, relating to the second sexual abuse incident. He asserts that the evidence is insufficient to support the trial court's conclusion that the second incident occurred after September 1, 2001, the triggering date for the indeterminate sentencing statute. Alternately, he argues that the rule of lenity requires us to apply RCW 9.94A.589, which imposes a less severe penalty for the charged crimes if committed before September 1, 2001.[5]

The ex post facto clause of the state and federal constitutions prohibits the State from increasing the punishment for a crime after its commission. U.S. Const. art. I, § 9 ("No bill of attainder or ex post facto law shall be passed."); Wash. Const. art. I, § 23 ("No bill of attainder,

[5] Because we agree with and accept the State's concession, we do not address Torres's alternate argument.

ex post facto law, or law impairing the obligations of contracts shall ever be passed."); *Parker*, 132 Wn.2d at 191. To avoid an ex post facto violation, the State must prove that the criminal conduct occurred after the effective date of a statute elevating the penalty for the crime charged. A jury must decide the factual question of when the crime occurred. *State v. Parker*, 132 Wn.2d 182, 192 n.14, 937 P.2d 575 (1997).

The State concedes the sentencing error, citing *Parker*, 132 Wn.2d at 191, as controlling authority. We accept the State's concession.

RCW 9.94A.712 elevated the penalties for first degree rape and first degree child molestation by requiring a trial court to impose an indeterminate sentence, with the statutory maximum as the upper end of the sentencing range. Under that statute, the mandatory statutory maximum sentence for Torres's crimes is life imprisonment. The statute previously in effect required the trial court to impose a determinate sentence within the standard sentencing range, absent justification for an exceptional sentence. Based on his offender score, the maximum standard range sentences for his crimes are 160 months (first degree child rape) and 89 months (first degree child molestation).

The State alleged, and the jury found, that each of the four crimes occurred between November 1, 1999 and June 30, 2002. At sentencing, the State argued that the only reasonable conclusion from the evidence was that the second incident occurred after September 1, 2001, because A.L. testified that it happened while she and Torres watched *American Pie II*, released in January 2002. But the jury need not have believed that A.L. correctly recalled watching that movie with Torres to believe that the second incident occurred.

Because the State did not prove that any of the charged offenses occurred after September

1, 2001, the trial court erred in sentencing Torres under RCW 9.94A.712. The remedy is to remand for resentencing.[6]

STATEMENT OF ADDITIONAL GROUNDS (SAG) ISSUES[7]

Ineffective Assistance of Counsel

Failing to Move for a Continuance

In his SAG, Torres first repeats his appellate counsel's argument that he received ineffective assistance when his counsel failed to move for a continuance. We addressed this issue as raised by counsel and we do not discuss it further.

Reference to Torres's Affiliation with Tacoma Police Department

Torres further argues that his attorney provided ineffective assistance in failing to object and to move for a mistrial when the lead investigator identified Torres as a member of the Tacoma Police Department. As it could be considered a legitimate trial tactic to avoid amplifying the detective's statement, *see State v. Gladden*, 116 Wn. App. 561, 568, 66 P.3d 1095 (2003) (failure to object to reference to defendant's prior criminal history to avoid drawing further attention), Torres's argument fails.

Moreover, because the trial court had reserved any ruling on the admissibility of

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[6] We note that the imposition of an indeterminate sentence here raises additional due process concerns because the State did not advise Torres in advance of trial that he could be subject to imprisonment for the remainder of his natural life. *See State v. Crawford*, 128 Wn. App. 376, 384, 115 P.3d 387 (2005) (it is "fundamentally unfair" not to provide advance notice of the possibility of a life sentence without parole because a person needs such information in evaluating the risks of trial versus guilty plea and other strategic decisions), *review granted*, 156 Wn.2d 1012, 2006 Wash. LEXIS 313 (2006). Torres only became subject to the possibility of life imprisonment without parole when the State extended the charging period on the first day of trial.

[7] We include additional facts necessary to discuss the SAG issues.

references to Torres's employment status, Portman's statement violated no preliminary ruling. Thus, defense counsel could have reasonably believed there was no basis to move for a mistrial.

Sequestering the Jury

Torres next argues that his attorney gave ineffective assistance when he failed to move the trial court to sequester the jury. Torres's argument fails because the trial court took proper steps to assure an untainted jury.

The record shows that both defense counsel and the trial court took several measures to ensure that publicity surrounding the case did not prejudice the jury. Counsel devoted a substantial portion of voir dire to assessing the effect, if any, that the pretrial publicity had on jurors' attitudes toward police officers accused of domestic violence. At defense counsel's request, the trial court instructed counsel to refer to Torres only as a "law enforcement officer," not a member of the Tacoma Police Department, in an effort to minimize any prejudicial effect of adverse publicity. At the start of and throughout trial, the court repeatedly instructed the jury to avoid any exposure to media reports. Although the case received substantial publicity before and during trial, nothing in the record shows that it had any effect on the jury.

Jury Selection

Juror No. 22

Torres next contends the he did not receive a fair trial because the trial court permitted a Pierce County Sheriff's Office detective to serve on the jury. He argues that an investigator on the crimes charged worked next door to juror No. 22 (who eventually served as presiding juror) and that juror No. 22 may have prejudiced the jury. SAG at 4.

Counsel and the trial court agreed that, based on questionnaires submitted to the venire,

some jurors would be questioned individually without the full venire present. During that examination, defense counsel assertively inquired about juror No. 22's ability to be fair. Juror No. 22 maintained that he would be fair. Defense counsel moved to excuse the juror for cause. The court denied the motion. It did not err in doing so where the juror expressed his ability to be fair. *See State v. Noltie*, 116 Wn.2d 831, 839, 809 P.2d 190 (1991) (trial court is in the best position to evaluate a juror's ability to be fair, and a party challenging the decision must show more than the mere possibility of bias).

Moreover, during general examination of the venire, defense counsel only asked juror No. 22 one further question. Defense counsel did not use a peremptory challenge to excuse juror No. 22. Nothing in the record shows that counsel had used all his peremptory challenges. *See State v. Tharp*, 42 Wn.2d 494, 500, 256 P.2d 482 (1953) (defendant must show the use of all his peremptory challenges to establish prejudice arising from trial court's refusal to dismiss a juror for cause). The record fails to establish support for Torres's claims.

Juror Named "Brame"

Torres also claims that his counsel provided ineffective assistance in failing to thoroughly investigate a juror with the surname "Brame." SAG at 6.

Torres claims that counsel ineffectively questioned a juror, whose name Torres later learned was Mose Brame. He claims prejudice due to the jury's "pressure to convict" because of pretrial publicity about Chief Brame's murder/suicide. SAG at 6.

In reviewing the record, it appears that prospective jurors completed a questionnaire calling for them to disclose any relationships with law enforcement personnel. As the juror did not disclose any, Torres's argument fails.[8]

Cross-Examination

Torres next contends that the trial court abused its discretion when it prevented his counsel from effectively cross-examining A.L. We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). Similarly, we will not reverse a court's decision to limit cross-examination absent a manifest abuse of discretion. *Darden*, 145 Wn.2d at 619. A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

During cross-examination, Torres used the child interviewer's handwritten notes to impeach A.L.'s testimony. The State objected, arguing that counsel improperly used extrinsic evidence because Torres failed to show any inconsistency between A.L.'s testimony and the notes.

Because of the late hour, the trial court dismissed the jury before hearing argument on the objection. Defense counsel reviewed the notes and admitted that he had asked A.L. about the wrong page. The trial court sustained the objection and directed the defense counsel to "start over" with the line of questioning when the trial resumed the next day. II RP at 215. The trial court also agreed with the State that defense counsel should lay a proper foundation before impeaching A.L. with the notes by identifying what portion of her testimony was inconsistent with the notes.

The trial court did not improperly interfere with Torres's cross-examination of A.L. but, rather, it followed the rules of evidence in requiring Torres to identify an inconsistency before

[8] Torres's prejudice argument is otherwise too attenuated to persuade us.

impeaching A.L.'s testimony with extrinsic evidence of a prior inconsistent statement. *See* ER 613.

Hearsay Testimony

Torres next contends that the trial court erred in admitting Hector's and C.B.'s hearsay testimony. Hector gave the police a handwritten statement describing A.L.'s disclosures. During cross-examination, Torres used the statement to impeach Hector's testimony, asking: "But there is nothing in here that would indicate that he ever placed his hands on her body in any location, is there?" II RP at 115. On redirect, the State asked Hector to identify the sex acts that he had described in the statement. Torres objected on hearsay grounds, but the trial court overruled the objection.

The trial court did not abuse its discretion in overruling Torres's objection. Under ER 613(b), when a party offers extrinsic evidence of a witness's prior inconsistent statement, the opposing party may ask questions to help the witness explain or deny any apparent inconsistency. The trial court properly permitted the State to show that Hector's statement was consistent with his testimony at trial, in response to Torres's suggestion to the contrary.

Torres asserts further trial court evidentiary error when it allowed the State to ask C.B. to relate her conversation with A.L. on the school bus. Torres objected on hearsay grounds. The State argued that the testimony fell within the hearsay exception for then existing mental and emotional condition. ER 803(a)(3). The trial court overruled the objection. C.B. then described A.L.'s reluctant disclosures to her on the bus. Because the defense suggested that A.L. fabricated her disclosures, the trial court did not abuse its discretion in overruling Torres's objection. *See* ER 801(d)(1)(ii) (prior consistent statements not hearsay when declarant testifies at trial and is

subject to cross-examination).

Closing Argument

Torres further argues that the prosecutor committed misconduct in summarizing A.L.'s testimony during closing argument.

To prevail in a prosecutorial misconduct claim, the defendant must show that the prosecutor's comments were improper, resulting in prejudice. *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). A prosecutor has wide latitude to draw reasonable inferences from the evidence. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 716, 101 P.3d 1 (2004).

The following colloquy took place during Torres's cross-examination of A.L.:

Q: Now, according to what I believe that you have said, Michael didn't force you, in other words, physically hold you or force you to do anything; isn't that true?
A.: No.
Q: That is not true?
A: Yes.
Q: It is true that he didn't force you to do anything?
A: No.
Q: And you claimed that Michael put his penis in your mouth; isn't that correct?
A: Well, he had told me that it would work faster.
Q: So, did you put your mouth on his penis?
A: Yes.

III RP at 245-46.

In summarizing A.L.'s testimony during closing argument, the prosecutor said:

> Now, there is one key part of this testimony, and it wasn't when I was asking the questions. It was when the defense attorney was asking the questions. And she responded to a very particular question from [defense counsel]. He was asking, and she was taking about the oral sex. And he phrased this question, and I am not going to get it exactly. The words he used or the phrasing that he used was, and then he told you to put your mouth on his penis, and she corrected him. She said, that's not what happened. And she repeated what she had said on Thursday the week before. He told me it would go faster if I use my mouth. Now that

> testimony, that's about a real event. That's a kid having a picture in her mind of what happened to her, and telling you this is how it happened. That's real testimony about the real event.

V RP at 555-56.

Torres takes issue with the prosecutor's words "that's not what happened," arguing that they "add an emotion to A.L.'s [testimony] that simply was not there." SAG at 14. The argument fails. The prosecutor fairly summarized A.L.'s testimony. The colloquy shows that A.L. particularly stated what did and did not occur; that was the point of the prosecutor's argument--that in testifying, she provided precise response to questions, suggesting that she related facts, not fabrication. Finally, the court instructed the jury that closing argument was not evidence. We presume that the jury follows such instructions. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

Jury Deliberations

Finally, Torres contends that the trial court erred in denying the jury's request to review a transcript of A.L.'s interview during jury deliberations.

Keri Arnold-Harms works as a child interviewer with the Pierce County Prosecutor's Office. She interviewed A.L. Arnold-Harms taped the interview and also made extensive handwritten notes. The State entered both the tape and the handwritten notes into evidence. Arnold-Harms referred to her notes to refresh her memory during testimony. The State asked Arnold-Harms to describe the interview techniques she used with A.L. But the State did not play the tape-recorded interview to the jury.

During jury deliberations, the jury sent a handwritten note to the trial court, asking: "Can we have access to exhibits other than pictures? Specifically, the written statements from Carrie

[sic] Arnold Harms and/or the tape recording of [A.L.'s] disclosure. Can we see [A.L's] testimony transcripts?" CP at 62.

The trial court returned a note stating: "You have all the exhibits admitted into evidence. Please re-read your jury instructions." CP at 62.

The trial court did not abuse its discretion in denying the jury's request. The State offered the interview notes, tape recording, and interview transcript for the limited purpose of rebutting the implication that A.L. fabricated the disclosures. ER 801(d)(1)(ii). Although their existence was in evidence, the contents of the exhibits were not read into evidence. Thus, the trial court properly denied the jury's request. If the exhibits had impeachment value, as Torres contends, his defense counsel could have used them to impeach A.L.'s testimony at trial.

We affirm the convictions and vacate the sentence and remand for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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Houghton, P.J.

We concur:

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Armstrong, J.

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Penoyar, J.